Supreme Court, U.S.
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No. 02-524

IN THE

SUPREME COURT OF THE UNITED STATES

JANETTE PRICE,

Petitioner,

— v.—

DUYONN ANDRE VINCENT,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

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INTEREST OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS[1]

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide–along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives, NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court on a variety of criminal justice issues. *See* NACDL's website at www.nacdl.org.[2]

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

2. The NACDL will not address the first question presented by the Petitioner, concerning the standard of review to be applied to whether the Michigan Supreme Court's determination that the trial court did not render a directed verdict of acquittal was a determination of fact or a conclusion of law under the Anti-Terrorism and Effective Death Penalty Act of 1996..

STATEMENT OF THE CASE

Respondent and two co-defendants were charged with murder and unlawful possession of a firearm in connection with a shooting death. Under Michigan law, the state can charge a defendant with "open murder," and the jury determines the degree of murder. After the prosecution rested its case, the defendants moved jointly for a directed verdict of acquittal on first degree murder, on the ground that the government had not introduced sufficient evidence to meet its burden of proving beyond a reasonable doubt that the defendants acted with premeditation and deliberation. Outside the presence of the jury, the trial judge heard argument from both sides and then stated, "I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay." *Joint Appendix* ("*J.A.*") at 13.

At the end of the hearing, the prosecutor requested an opportunity "to make a brief restatement in terms of the First Degree Murder . . ." when court resumed the next day. The trial judge responded, "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." *J.A.* at 18. When he made this request, the prosecutor did not ask for reconsideration of the court's grant of the defense motion, nor did the trial judge state on the record that he was reserving judgment or would postpone his decision on the motion until the prosecutor made his "brief restatement." The court's docket entry for that day states, "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER. CT: II FEL. FIREARM STAY THE SAME." *J.A.* at 1. The next day, the prosecutor argued that the evidence to support the first degree murder charge was sufficient. In response to defense counsel's argument that the court had granted the directed verdict motion, preventing further consideration of first degree murder under double

jeopardy, the trial judge stated, "Oh, I granted a motion, but I have not directed a verdict." *J.A.* at 36. Respondent later testified at trial and the jury found him guilty of first degree murder.

SUMMARY OF THE ARGUMENT

The Court enunciated the fundamental protection provided by the Double Jeopardy Clause in *Ball v. United States*, 163 U.S. 662 (1896): "The verdict of acquittal was final, and could not be reviewed, on error *or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution." *Id.* at 671 (emphasis added). The constitutional protection afforded by an acquittal means that a court may not conduct any further proceedings on the acquitted charge regarding the guilt or punishment of the defendant, including the continuation of a trial.

The Court has been consistent in applying the holding of *Ball* regarding the preclusive effect of an acquittal on any further proceedings regarding the underlying charge. *See Sanabria v. United States*, 437 U.S. 54,72-73 (1978) ("finding of fact [of insufficient proof of an element of the charged offense] stands as an absolute bar to any further prosecution for participation in that business."). The double jeopardy protection prohibits further judicial action that threatens the integrity of the acquittal in any procedural form: an appeal, second prosecution on the charge, and continuation of the same proceeding on the acquitted charge. Even if a defendant's trial on other charges–including lesser-included offenses–may continue, the grant of a judgment of acquittal on a charge means that neither the court nor the jury may take any further action that would constitute a second jeopardy.

The trial judge in this case granted the motion for a directed verdict on the first degree murder charge, and the

court's docket entry establishes quite clearly that the Respondent was acquitted of that offense. Therefore, the charge could not be reinstated at a later time, regardless of whether the jury learned of the trial judge's action. This case is controlled by *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), in which the Court held that entry of a demurrer by the trial court was an acquittal and, therefore, "whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Id.* at 145.

The Double Jeopardy Clause applies regardless of whether a judge or jury hears the matter. The Court has never held that the constitutional protection afforded a defendant applies differently depending on the identity of the trier of fact once jeopardy attaches. The Court should adhere to the clear rule it has followed consistently, that an acquittal terminates the proceeding on the charge. Defendants and their counsel must be able to rely on the protection afforded by the Double Jeopardy Clause because the possibility of continuing jeopardy on a charge will affect strategies for presenting an appropriate defense. Most importantly, the defendant's decision whether to waive the protection of the Fifth Amendment privilege against self-incrimination may depend on the charges being prosecuted. The possibility that a defendant could convict himself on a charge that a court initially decided should not go forward because the government had not met its constitutionally-mandated burden of proof flies in the face of the fundamental protection of the Double Jeopardy Clause.

ARGUMENT

I. AN ACQUITTAL TERMINATES ALL FURTHER FACTFINDING PROCEEDINGS AGAINST THE DEFENDANT ON THE ACQUITTED CHARGE, REGARDLESS OF WHETHER THE JURY IS INFORMED OF THE ACQUITTAL OR WHETHER THE TRIAL WILL CONTINUE BEFORE THE SAME JURY.

The Double Jeopardy Clause of the Constitution protects the defendant from being "twice put in jeopardy" for the offense. The Court made clear over a century ago the effect of an acquittal on further proceedings against the defendant: "The verdict of acquittal was final, and could not be reviewed, on error *or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution." *Ball v. United States*, 163 U.S. 662, 671 (1896) (emphasis added). As the Court explained in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), *Ball*'s description of the double jeopardy protection is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence . . . ." *Id.* at 571. The Double Jeopardy Clause provides an absolute protection for a defendant from a subsequent appeal by the government, a second trial on the charges, or a continuation of the initial prosecution, once the trial court enters a judgment that constitutes a decision on the sufficiency of the government's evidence. *See United States v. Scott*, 437 U.S. 82, 88 (1978) ("This Court held [in *Ball*] that the Double Jeopardy Clause precluded further prosecution of the defendant who had been *acquitted* at the original trial . . . ." (emphasis in original)).

The constitutional protection does not depend on whether the trial is before a jury or to the court. Jeopardy

attaches once the jury is sworn in to begin its service, *Downum v. United States*, 372 U.S. 734 (1963), or when the court begins to hear evidence from a witness. *Serfass v. United States*. 420 U.S. 377 (1975). Once jeopardy attaches to a trial, the Court permits a second proceeding only in specific situations involving a mistrial or successful appeal by the defendant of a conviction, neither of which is relevant in this case. The Court has made it clear that, once there is an acquittal, the particular form of the judgment or availability of the jury to continue its deliberations does not affect the application of the double jeopardy protection prohibiting further proceedings. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) ("we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.").

In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court prohibited any consideration through a writ of mandamus of an acquittal when the trial court "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. The Court reiterated this position in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In that case, the trial court had entered a judgment of acquittal for insufficiency of the evidence after dismissing a "hopelessly deadlocked" jury, and the government argued that it could appeal the trial court's ruling because "only a verdict of acquittal formally returned by the jury should absolutely bar further proceedings . . . ." *Id.* at 572. The Court's response to that argument was simple and direct: "*We cannot agree.*" *Id.* (emphasis added).

Petitioner makes much of the fact that the trial judge did not inform the jury that he granted the motion for a directed verdict, so that the original jury could still render a

verdict once the trial judge reversed his position. See *Petitioner's Brief* at 33 ("The present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or *until the jury is instructed in accordance with its terms.*"); (emphasis added). This argument, however, is similar to the position the Court rejected in *Martin Linen Supply*; namely, that the absence of a formal jury verdict does not affect the determination of whether double jeopardy prohibited any further proceedings. Even if the jury remains available to render a verdict, a trial judge's ruling that the government has not introduced sufficient evidence to prove the crime ends the matter. The role of the jury as the trier of fact does not somehow displace the authority of the trial judge to enter a judgment of acquittal.

The effect of a trial court's decision on the applicability of double jeopardy does not depend on the its characterization of that decision. *See Martin Linen Supply Co.*, 430 U.S. at 571 ("we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action."). The view expressed by the trial judge in this case–that the grant of the defendants' motion for a directed verdict did not trigger any double jeopardy consequences because the jury had not been informed of the ruling–is irrelevant to this Court's determination of whether the Fifth Amendment prohibits any further proceedings. *But see Petitioner's Brief* at 29 ("It is clear from the record that it was the trial judge's position that the Double Jeopardy Clause did not prevent him from reconsidering the grant of a motion for directed verdict since he had not informed the jury of his ruling.").

In *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the Court ruled on the characterization of the trial court's decision for double jeopardy purposes when it stated:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," *United States v. Scott*, 437 U.S. 82, 96 (1978) (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

Id. at 144 n.5. The grant of the motion for a directed verdict in this case constituted an acquittal that terminated all further proceedings, regardless of whether the judge believed the Double Jeopardy Clause applied or the jury continued to sit in judgment on the other charges. The protection afforded by the Double Jeopardy Clause applied, and as stated in *Ball*, that decision "could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution." 163 U.S. at 671.

The Double Jeopardy Clause prohibits any further *proceedings* on a charge once there is an acquittal, not simply a second trial or an appeal. The Court's unanimous decision in *Smalis* is controlling precedent and supports the Sixth Circuit's decision in this case that further proceedings should not have occurred once the trial judge granted the directed verdict motion. *Smalis* held that the Double Jeopardy Clause barred the state's appeal after the trial judge granted a demurrer to the charges:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S.

294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." Brief for Respondent 87-88. But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S., at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona v. Rumsey*, 467 U.S. 203 (1984). When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into " 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.' " *Martin Linen*, 430 U.S., at 570.

Id. at 145-46.

The United States, in its Brief as *amicus curiae*, advances the argument that double jeopardy does not prohibit further proceedings unless there would be an appeal from a final judgment requiring a second trial, but not the continuation of the original proceeding. *See Brief for the United States* at 13-14 (Respondent's argument "overlooks the

pivotal distinction between reconsideration of an initial ruling by the trial court itself and reversal of the trial court's ruling on *appeal* . . . An appeal necessarily implicates the prohibition against post-acquittal trial proceedings . . . .") (emphasis added). The United States asserts that there was no violation of Respondent's double jeopardy right because the prosecution "seeks only to continue the trial to a verdict rather than to initiate a *new trial* at which it can present a more persuasive case." *Id.* at 20 (emphasis added).

The United States misreads the Court's holdings on the effect of an acquittal when the same jury continues to hear evidence on other charges. While decisions reference the defendant's personal interests in avoiding a second trial,[3] the Double Jeopardy Clause does not prohibit only multiple proceedings before different juries or post-verdict appeals. Simply because a defendant's first trial would continue before the same jury does not affect the constitutional determination of whether there was an acquittal that bars further proceedings on the acquitted charge. As the Court stated in *Sanabria v. United States*, 437 U.S. 54 (1978): "It is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal

3. *See, e.g., Arizona v. Washington*, 434 U.S. 497, 505 (1978) (discussing a "defendant's valued right to have the trial concluded by a particular tribunal"); *United States v. Martin Linen Supply Co.*, 430 U.S. at 570 n.7 ("The absence of a threatened second trial mitigates the possibility of governmental jury shopping and substantially reduces the expense and anxiety borne by the defendant."); *United States v. Wilson*, 420 U.S. 332, 343 (1975) ("When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*quoting Green v. United States*, 355 U.S. 184, 187-88 (1957)).

or giving it erroneous instructions that resulted in an acquittal." *Id.* at 64 n.18.

Under *Smalis*, the Double Jeopardy Clause forbids any "postacquittal factfinding procedings." The focus urged by the United States on the absence of an appeal or possibility of a second trial in this case misses the point that double jeopardy prohibits all forms of judicial proceedings on the charge after an acquittal. Quite simply, once there is a decision that the government failed to introduce sufficient evidence to convict, the case is over and the prosecution cannot pursue the charge any further. Therefore, the Constitution proscribes any additional proceeding on a charge–whether it be an appeal, second trial, or continuation of the original trial–after an acquittal.

II. THE COURT'S CLEAR DOUBLE JEOPARDY RULE BARS RECONSIDERATION OF A DECISION THAT IS AN ADJUDICATION ON THE SUFFICIENCY OF THE GOVERNMENT'S EVIDENCE.

For over a century, the Court has adhered to the position that an acquittal of a defendant prohibits the government from pursuing the charge any further. *Ball v. United States*, 163 U.S. 662 (1896). The double jeopardy protection applies whether the trier of fact is the court or a jury. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). Once jeopardy attaches, any adjudication on the sufficiency of the government's case in favor of the defendant precludes further prosecution of the defendant on the charge. The issue in this case is whether the trial judge's grant of the defendants'

motion at the close of the government's case constitutes an acquittal for double jeopardy purposes. The NACDL submits that the answer is clearly yes, and therefore further consideration of the first degree murder charge was prohibited.

The critical issue in determining whether there has been an acquittal for double jeopardy purposes is whether the trial court reached a determination on the sufficiency of the evidence in favor of the defendant. If the trial court's decision is not on the sufficiency of the government's evidence of guilt, then the timing of that decision does not change the application of the double jeopardy protection. In *United States v. Wilson*, 420 U.S. 332 (1975), and *Serfass v. United States*, 420 U.S. 377 (1975), the Court refused to find that double jeopardy applied to prohibit further proceedings when the rulings at issue were not decisions based on the merits of the government's evidence at trial. *Serfass* involved a decision on a pre-trial motion to dismiss, although granted during trial, and in *Wilson* the appeal was from the grant of a post-verdict motion for acquittal after the jury rendered a guilty verdict. *See Wilson*, 420 U.S. at 352-353 ("when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause."); *Serfass*, 420 U.S. at 391-92 ("Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.").

Thus, the Court is unwilling to invoke double jeopardy for decisions that do not rise to the level of a judgment on the merits of the government's evidence. Once there is such a factual finding on the insufficiency of the government's evidence, however, the acquittal has constitutional significance if "jeopardy has once attached and an accused has been subjected to the risk of conviction." *Serfass*, 420 U.S. at 392. Similarly, in *Wilson*, the Court stated:

> [W]e continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilty after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second, and it would disserve the defendant's legitimate interest in the *finality of a verdict of acquittal*.

420 U.S. at 352 (emphasis added). The Court reaffirmed the critical importance of a court's ruling on the sufficiency of the evidence for double jeopardy purposes in *United States v. Scott*, 437 U.S. 82 (1978), stating that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *Id.* at 91.

In *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the Court maintained the unbroken line of decisions that accord an acquittal based on the insufficiency of the government's evidence full effect in stating that "whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." 476 U.S. at 145. Further, the Court rejected the State's argument that it modify its double jeopardy rule to permit the trial judge to continue the *same* proceeding that had been previously stayed pending resolution of the appeal: "What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. Our past decisions, which we are

not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause." *Id.* at 144.[4]

This term, in *Sattazahn v. Pennsylvania*, 573 U.S. ___, 123 S.Ct. 732 (2003), the Court reiterated the effect of an acquittal on the permissibility of future proceedings, in the context of a second capital sentencing. The Court held that "the relevant inquiry for double jeopardy purposes was . . . whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence–*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Id.* at 738. This holding is consistent with the Court's precedents establishing a clear rule for application of the Double Jeopardy Clause; namely, once the trier of fact determines that the government has not introduced sufficient

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4. Petitioner asserts that the trial judge's initial decision to grant the directed verdict motion was "erroneous," as if that mitigates the effect of the trial judge's ruling or authorizes a less-strict application of double jeopardy. The Court has been clear, however, that the correctness of the trial court's decision to enter an acquittal based on insufficient evidence after jeopardy attached is irrelevant. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the district judge, upset at "supposed improper conduct" of the federal prosecutor, "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. Although the Court apparently agreed with a statement of the First Circuit "that the acquittal was based upon an egregiously erroneous foundation," it stated that "[n]evertheless, '[t]he verdict was final, and could not be reviewed * * * without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.'" *Id.* (quoting *Ball*, 163 U.S. at 671). In *Sanabria v. United States*, 437 U.S. 54 (1977), the Court stated that "we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* at 68-69 (footnote omitted). An incorrect or misguided ruling cannot be reconsidered once the trial court determines that the government has not presented sufficient evidence to prove all the elements of an offense.

evidence on the elements of the offense, there can be no further prosecution of that offense.

The Petitioner and the United States both seek to change the Court's clear acquittal rule by asserting that a trial court should be permitted to reconsider any ruling to correct an error so long as the jury was not informed of the decision and the same jury remains available as the trier of fact. The example provided by Petitioner of a trial court's correction of a ruling that otherwise might have resulted in the invocation of the double jeopardy prohibition is *People v. Vilt*, 113 Ill. App. 832, 833-34 (Ill. Ct. App. 1983), *quoted in Petitioner's Brief* at 39. The trial judge in *Vilt* had the two defendants confused when deciding a motion on the sufficiency of the government's evidence, and immediately corrected the error when the prosecutor pointed it out. This decision does not support the argument that reconsideration at any time is permissible because in *Vilt* the trial court *immediately* corrected its error and did not conduct further proceedings after its initial decision. Unlike the correction of an error, an acquittal is not the result of a judge uttering magical words, but a decision that the government has not met its burden of establishing all the elements of a crime beyond a reasonable doubt. When the trial judge in this case granted the motion for a directed verdict, without stating that the decision was tentative or that the court was reserving its decision, then the court entered a valid order resulting in an acquittal on first degree murder that triggered the protection of the Double Jeopardy Clause.

Petitioner asserts that the "Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous grant of a motion for directed verdict where the jury was not informed or discharged and not further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal."

Petitioner's Brief at 29. Petitioner asks the Court to alter its longstanding rule by recognizing that "[t]here are at least three conceivable points at which jeopardy could be held to terminate by acquittal in a jury trial. The first is upon utterance of words by a trial judge granting a motion for an order of acquittal. The second is upon the court's instruction to the jury that it is not to consider the charge in question. The third is upon the jury's discharge." *Id.* at 34. In effect, Petitioner would condition the double jeopardy protection on either the court informing the jury of its ruling in favor of the defendant or the jury rendering a final verdict, and nothing less. The Court, however, has never held that a trial court's decision to grant an acquittal is ineffective for the double jeopardy protection to apply until a jury renders a verdict on the merits or is discharged.

The United States argues for a narrower–but no less unsupported–rule that "a court's reconsideration of its own initial decision to grant a motion for acquittal raises no double jeopardy concerns."[5] *Brief for the Unites States* at 13. In support of its position, the United States relies on the principle

5. In a footnote, the United States tries to distinguish *Smalis* on the ground that "[t]he defendant did not argue–and neither this Court's opinion nor any of the state court opinions suggested–that the trial court was barred by the Double Jeopardy Clause from reconsidering its initial decision." *Brief for the United States* at 13 n.5. That issue was not raised in the courts below or in this Court because it was irrelevant. The Court's silence on an issue it could not have considered is hardly persuasive on the scope of the Double Jeopardy Clause. Petitioner also distinguishes *Smalis* on the ground that "[t]he present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or until the jury is instructed in accordance with its terms." *Petitioner's Brief* at 33. The presence or absence of a written order was irrelevant to the Court's decision in *Smalis*, and because the case was tried to the court there could be no instruction to the jury. *Smalis* concerned whether or not the trial judge's decision was an "acquittal," the identical issue in this case.

that trial courts have the "inherent authority to reconsider and correct their interlocutory rulings," *id.* at 14, and therefore reconsideration "specifically renders the initial ruling non-final and hence inconclusive." *Id.*

Petitioner and the United States assume that a trial court has the inherent authority to avoid the Double Jeopardy Clause by a subsequent announcement that it is reconsidering an earlier decision that the government had not introduced sufficient evidence to convict the defendant. But, there is no principled basis to distinguish between a decision to grant a directed verdict at the conclusion of the government's case, a directed verdict at the close of all the evidence, and a jury verdict of not guilty. Yet, that is precisely what Petitioner and the United States do in arguing that double jeopardy does not apply to a ruling on the sufficiency of the evidence before the jury reaches a decision.

This Court consistently recognizes, however, that a fundamental protection afforded by double jeopardy is the finality of a decision on the merits of the government's evidence. *See Sattazahn v. Pennsylvania*, 573 U.S. ___, 123 S.Ct. 732, 744 n.2 (2003) ("The Court has many times said that the Double Jeopardy Clause protects the integrity of 'final judgments.'"); *Scott*, 437 U.S. at 92 (noting that "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment" (citing *Crist v. Bretz*, 437 U.S. 28, 33 (1978)); *Wilson*, 420 U.S. at 352 (Granting the government "broad appeal rights" after an acquittal "would disserve the defendant's legitimate interest in the finality of a verdict of acquittal."); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 *U. Ill. L. Rev.* 827, 852 ("Thus, an acquittal always bars further proceedings. This is the only absolute rule of traditional double jeopardy analysis, and the Supreme Court has clung tenaciously to it through a series of cases that invited exceptions."). A trial court's

inherent authority to reconsider its rulings generally cannot alter the constitutional protection given a defendant when there is an acquittal on the merits.

Adopting the position advanced by Petitioner and the United States would denigrate the protection afforded by the Fifth Amendment. For example, the argument advanced by the Petitioner and the United States would permit a judge to reconsider a grant of an acquittal at any time before the jury rendered a final verdict. Trials that take weeks or even months are not uncommon, so a trial judge could grant a defendant's motion that there was insufficient evidence to prove a charge, and then decide much later that the earlier decision was mistaken. While the Petitioner and the United States criticize Respondent's argument because the prohibition on further proceedings under double jeopardy is immediate, their approach would permit a judge to reconsider a ruling at any time, without limitation. The Double Jeopardy Clause does not afford the judiciary the authority to grant and then remove the constitutional protection just because a jury trial has not ended with a final judgment.

The pernicious effect of recognizing an unlimited right for trial judges to reconsider an acquittal–so long as the jury remains available to decide the case–is illustrated by the dilemma defense counsel would face. If a judge granted a defense motion for an acquittal on a charge at the end of the government's case because of insufficient evidence, counsel might well recommend that the client testify regarding the remaining counts because the threat of a more severe punishment has been removed. After hearing the additional evidence, including the defendant's testimony and the government's rebuttal case, could the trial court decide to "reconsider" the earlier decision and reinstate the previously dismissed counts? Surely the Double Jeopardy Clause bars reconsideration based on new evidence.

In *Burks v. United States*, 437 U.S. 1 (1978), the Court stated, "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. Permitting a trial court to reconsider an acquittal when that could involve consideration of additional evidence, provided by either the defendant or the government, clearly violates the double jeopardy protection described in *Burks* as "central to the object of the prohibition against successive trials." *Id.* Regardless of the source of the evidence, it would be further factfinding after an acquittal in violation of the Double Jeopardy Clause.

Such a possibility would be entirely possible under the analysis advanced by the Petitioner and the United States, because it would permit reconsideration of an acquittal by the trial judge at any time prior to the entry of a final judgment by the jury. The United States asserts that the Respondent and the courts below took a position that was "highly indeterminate and defies principled application," *Brief for the United States* at 24. But, it is Petitioner and the United states that seek a "reconsideration exception" to the Double Jeopardy Clause that undermines the consistently enforced principle that a decision on the sufficiency of the government's evidence in favor of the defendant prohibits any further proceedings on the charge.

Defense counsel make strategic decisions throughout trial regarding the witnesses to call, the evidence to offer for admission, and the type of defense to put forth to the trier of fact. The presence of certain charges, including greater- or lesser-included offenses, with their different levels of intent, will influence the arguments presented to the jury, the types of cross-examination to pursue, and the decision whether to pursue certain issues on direct examination of a witness who may be subject to impeachment. In this case, the original

decision on the motion for a directed verdict meant that first degree murder, which required proof of premeditation and deliberation, was no longer available for a conviction.

If a trial judge could reconsider an acquittal at a later point in the trial, then defense counsel will never be certain whether a strategy decision might wind up convicting the client, perhaps with the client's own testimony. The most important decision defendants and their counsel make is whether to waive the Fifth Amendment privilege against self-incrimination and testify.[6] Any potential ruling that could adversely affect a defendant's Fifth Amendment privilege should be viewed with great caution.

As the Court has recognized on numerous occasions, one of the "basic functions" of the privilege against self-incrimination "is to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956)). Similarly, the Court prohibits any comment on a defendant's decision not to testify because it would be "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). *Griffin* described the problem that any witness–and especially

6. The Court stated in *Rock v. Arkansas*, 483 U.S. 44 (1987), that it "has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." *Id.* at 52 n.10. The ethics rules of the legal profession give the defendant in a criminal trial the final say in whether to testify, subject, of course, to the requirement that the testimony be truthful. *See ABA Model Rule of Professional Conduct* 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer . . . whether the client will testify.").

the defendant in a criminal prosecution–faces when called to testify:

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.

Id. at 613.

The "reconsideration exception" to the double jeopardy protection offered by Petitioner and the United States compounds the problem facing a defendant during trial by creating the possibility that one's own testimony could result in a conviction when that testimony should not have been considered by the trier of fact on the charge. Both the defendant and defense counsel need the certainty provided by the Court's consistent application of the double jeopardy principle that an acquittal is final.

Another shortcoming in the analysis of the Petitioner and the United States is that it conditions the double jeopardy protection on whether the case is tried to the court or before a jury. The argument of Petitioner and the United States appears to be that the Court should adopt an open-ended rule in jury trials permitting reconsideration of an acquittal to avoid the effect of the Double Jeopardy Clause. The Court has never distinguished the effect of an acquittal under double jeopardy based on which trier of fact heard the case. *See Smalis*, 476

U.S. at 145 ("Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause."). Moreover, the trial court has the authority to enter an acquittal even if a jury is empaneled to decide the case, and a dismissal of a charge based on the merits invokes the protection of double jeopardy just the same as a jury verdict.[7]

In *United States v. Martin Linen Supply Co.*, 430 U.S. at 564 (1977), the Court rejected the Government's argument that "only a verdict of acquittal formally returned by the jury should absolutely bar further proceedings . . . ." *Id.* at 572. The Court noted that while a trial judge cannot interfere with the jury's judgment by directing a verdict in favor of the government, "[s]uch a limitation on the role of a trial judge . . . has never inhibited his ruling in favor of a criminal defendant." *Id.* The presence of a jury that could find the defendant guilty does not make it permissible for a trial judge to reconsider a decision on the insufficiency of the government's evidence that otherwise would prohibit further proceedings on the charge.

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7. The Court recognized in *Hudson v. Louisiana*, 450 U.S. 40 (1981), and *Tibbs v. Florida*, 457 U.S. 31 (1982), that a court's "disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal." *Id.* at 41. In that situation, the court is sitting as a "13th Juror" in deciding whether the weight of the evidence supports the verdict, but not whether there was sufficient evidence from which any rational juror could find the defendant guilty beyond a reasonable doubt. *See Hudson*, 450 U.S. at 44-45 n.5 (double jeopardy "precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so . . . By definition, a new trial ordered by a trial judge acting as a '13th juror' is not such a case."). The trial judge in this case granted the defendants' motion for a directed verdict due to the insufficiency of the government's evidence of an element of the crime, and therefore the Double Jeopardy Clause applies to the decision.

The Petitioner and the United States stress how difficult it will be for appellate courts to determine exactly what a trial court decided if judges are not given unfettered discretion to reconsider a ruling at any point prior to the jury's verdict. *See, e.g., Brief for the United States* at 24-25 ("Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judge will think out loud along the way to reaching the final result." (quoting *State v. Collins*, 771 P.2d 350, 353 (Wash. 1989)). But a judge ruminating is quite different from a judge granting a defendant's motion for a directed verdict due to the insufficiency of the government's evidence. This Court has been called on a number of times to determine whether or not a decision of a trial court was–or was not–an acquittal on the merits. Indeed, the entire line of cases from *Fong Foo* through *Sattazahn* required the Court to determine if a decision amounted to an acquittal that invoked the protection of the Double Jeopardy Clause, including careful review of the trial record. As the Court noted in *Smalis*, a lower court's characterization of its decision "is not binding on us," 476 U.S. at 144 n.5, and determining the exact nature of a trial court's ruling is a common exercise for appellate courts.

CONCLUSION

The Double Jeopardy Clause is absolute once an acquittal occurs, despite any perceived unfairness to the government from the prohibition on further proceedings in a potentially meritorious case. The Court was willing to enforce the constitutional protection in cases like *Fong Foo* and *Sanabria*, despite the trial court's "egregiously erroneous" analysis or "erroneous evidentiary ruling," because the Double Jeopardy Clause does not permit any further consideration of an issue related to a defendant's guilt. The drastic effect of a

finding on the sufficiency of the government's evidene, even when questioned by the judge who made the initial decision, is not the result of new rule offered by the Respondent or the lower courts in this case, but the effect of the Court's clear understanding of the constitutional protection since *Ball*: "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution." 163 U.S. 662, 671 (1896); *see Sanabria*, 437 U.S. at 72-73 (A "finding of fact stands as an *absolute bar* to any further prosecution for participation in that business.") (emphasis added).

For the reasons set forth above, the NACDL respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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